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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-848

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA AND JUAN MIRANDA,

Appellees,

-v-

JACK A FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant

On Appeal From A Special Three Judge Court For The District Of Connecticut

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Dated January 17, 1974

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Pursuant to Rule 16(4) and (5), defendant respectfully submits the following in opposition to plaintiffs' Motion to Affirm and to inform the Court of a new decision which is pertinent.

Initially, defendant must deny both of plaintiffs' alleged grounds of their Motion to Affirm:

(1) The *precise* form of hearing mandated by the Due Process Clause is not in issue at all. In fact, when granting defendant's Motion for Stay pending disposition by this Court, the U. S. Dis-

trict Court stated, in part, 'why should the State be forced to institute new procedures before the U. S. Supreme Court decides whether or not its present procedures meet Due Process?'

(2) All of the issues raised in the Jurisdictional Statement are substantial.

ERRORS IN PLAINTIFFS' STATEMENT OF THE CASE

Plaintiffs' statement on page 4 of their Motion to Affirm continues the misleading idea that the letter which is sent to a claimant advising him that he has been disqualified, etc. only recites "a perfunctory statutory citation as the basis of disqualification." The District Court likewise erred in finding this to be the case, because it was stipulated by the parties and cited by the Court itself, J.S.A. 3, that the letter also gives an explanation to the claimant as to the reasons for the decision.

Thus the letter tells him exactly why the decision was made in addition to citing the pertinent statute. This fact is important to note since the Court erroneously cited this as one of the reasons why defendant's procedures fail to provide Due Process.

On page 5 of their motion, plaintiffs again claim that 60 to 70% of all decisions denying benefits is for failure to comply with the "reasonable efforts to obtain work" and "able and available" provisions of § 31-235(a) C.G.S. The District Court also made this finding, although it stated in footnote No. 7 that the defendant had disputed this figure but 'was unable to provide a more accurate figure.' The Court has ignored defendant's statement that it was impossible to produce an accurate figure because statistics were not kept in such a way that this could be done.

In addition to the above errors, the plaintiffs, in their reference to the facts concerning the plaintiff Steinberg, a college graduate, made no mention of the fact that while Steinberg continued to receive benefits, he was warned at prior interviews to improve his efforts to seek work. He was finally disqualified when he failed to heed such warnings. (Plaintiffs' exhibit B [Commissioner's Fact Finding and Decision] attached to original Complaint.)

ARGUMENT

Plaintiffs' claim, and part of the basis of the District Court's finding is, that the defendant's " 'seated interview system' does not provide sufficient procedural due process" because the claimant is not afforded:

(1) Advance notice of the interview or the precise issues involved;

(2) Opportunity to prepare arguments or present witnesses;

(3) Opportunity to confront adverse witnesses;

(4) Opportunity to consult with counsel; and because

(5) The Fact Finder may go beyond the record of the 'seated interview' in making his decision; and

(6) The only explanation a claimant receives is a perfunctory citation of a statute.

Let us examine same:

1) **No Advance Notice**

   a) Of the interview

   b) Of the precise issues involved.

The District Court has completely overlooked the fact that when claimants first apply for benefits, they are given pamphlets which advise them of their rights and obligations. (Paragraph 7 of Stipulation to Facts, Document No. 53 of Record) Likewise, most if not all claimants are given a benefit rights interview explaining their rights. In addition, these plaintiffs collected benefits for varying periods of time, thus they knew what they had to do in order to collect. They also knew that they had to discuss their efforts for the weeks in question with the interviewer every time they reported. (In Connecticut, although payments and determinations of eligibility are made on a week by week basis, the claimants report bi-weekly.) Thus, they knew or should have known that a new determination is made for each and every week for which benefits are claimed, and therefore one could be eligible for one week but ineligible or disqualified for the next.

How else or why should the defendant Administrator give notice of such an interview when the claimant already knows when to report, and knows what happens or can happen when he does report? And how can the defendant give advance notice of the precise issues involved when he does not know (except in job referral cases) what the issue will be until the claimant actually comes in and raises an issue himself by stating what he did or did not do to obtain employment the previous period in question? At the very least, plaintiffs had constructive notice of the interview and the issues.

It should be noted that the Court found, as stipulated, that the defendant does give advance notice in job referral cases when there is time to send same before the next scheduled visit.

2) No Opportunity To Prepare Argument Or Present Witnesses.

Again, what is to prepare? Assuming the claimants are truthful, they simply have to relate what they did to obtain work. They know before the Fact Finder does whether or not verification or corroboration might be necessary. They are free to bring whatever witnesses they wish with them, and, if necessary, they are allowed further time to get the "missing witness" or any written documentation that might be necessary. (Plaintiffs' Exhibit No. 9, Affidavit of E. Smarz, Page 10.)

3) No Opportunity To Confront Adverse Witnesses.

Plaintiffs themselves state that most denials involve questions of "reasonable efforts" and "able and available." Most of these cases do not involve third party information. Thus, in most cases there are no adverse witnesses to be confronted. In those cases where the defendant does receive third party information, the claimant is given ample opportunity to rebut same either orally or in writing, i.e. doctor's certificates etc. By statute, any doubt a Fact Finder may have must be resolved in favor of the claimant. § 31-247 (c) C.G.S. This Court has already upheld, in *Richardson v. Perales*, 402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), a procedure which lacked the right of confrontation and cross examination of witnesses where the claimant could present reports and testimony in rebuttal of written reports and testimony submitted against him. This holding has been followed in the very recent decision,

December 14, 1973, of the U.S. Court of Appeals for the Ninth Circuit in the case of *Crow v. California Department of Human Resources and Development*, _____F. 2d_____ (1973), (Petition for Certiorari filed _____). In a two to one decision which reversed a District Court ruling, the Court said, page ____, "We find the Constitution to demand here no more than is afforded by the Department's system, (regarding pretermination of unemployment compensation benefits) even though it does not require pretermination confrontation and cross-examination."

4) No Opportunity To Consult With An Attorney.

Here again the District Court erred. Claimants are not prohibited in any way from being represented at such hearings by an attorney. Again, since it is the claimant alone in most cases who knows what issues will be raised when he reports, he should make prior arrangements before reporting to have his attorney with him.

5) Fact Finder May Go Beyond Record of the Seated Interview

Defendant can only assume that what the court meant by this is that the Fact Finder is only searching out all facts which may have a bearing on the issues raised. Since the claimant is given the opportunity to rebut all information which might be adverse, and because any doubt the Fact Finder might have must be resolved in favor of the claimant, defendant submits that this does not constitute a denial of due process. On the contrary, it is one more example of the fairness with which these claimants are treated.

5) Perfunctory Citation Of The Statutes Violated.

As already stated above, the claimant does receive more than a perfunctory citation of the statute he allegedly violated. The decision letter fully explains the reason why the decision was made, and the Court and the plaintiffs are clearly in error on this fact.

'The Issue Is Not Yet Ripe For Review By This Court'

Plaintiffs again err by concluding that the "only substantial issue" is "the precise form of hearing mandated by the Due Process Clause as a prerequisite to terminating unemployment com-

pensation benefits." That is not the issue at all. The issue is whether or not the defendant's *present* procedures meet the minimum requirements of due process. Plaintiffs themselves, page 14 of their Motion to Affirm, cite that the District Court itself did not hold that *Goldberg v. Kelly* standards had to be met. Plaintiffs there cited the Court's statement that ". . . the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the State." The District Court, therefore, deliberately chose not to tell the defendant what procedures had to be followed, and the plaintiffs' contention on page 14 that the "Appellant chose to appeal to this Court *before the Court below had an opportunity* to fashion a final remedy" is clearly unwarranted and erroneous. (emphasis added) The District Court *chose* not to fashion a final remedy.

The real issue, of course, as stated in the Jurisdictional Statement, is whether or not the Court's decision in *Torres v. N.Y. State Department of Labor*, 405 U.S. 949 (1942), is as definitive for unemployment compensation cases as *Goldberg v. Kelly*, 397 U.S. 254 (1970) is for welfare cases. If it is, then the Connecticut District Court erred.

In addition to *Torres*, which defendant submits should be dispositive, there are other unemployment compensation cases to which reference has been made. For the sake of brevity in this document, the following points can only be mentioned, but will be expanded upon in defendant's brief to be filed if jurisdiction is noted. Likewise, our brief will establish not only that unemployment compensation cases must be treated differently from welfare cases, but that the defendant's procedures are essentially fair to the claimant and thus satisfy the requirements of "Due Process".

Goldberg v. Kelly is distinguishable primarily because it is a welfare case. *Wheeler v. Vermont*, 335 F. Supp. 856 (D. Vt. 1971), is distinguishable because Vermont procedures prevented the claimant from presenting his case to the decision-maker. Also, the appeal tribunal in Vermont was a part of the State's Employment Security Division. In Connecticut, the claimant presents his case directly to the Fact Finder who makes the decision, and his appeal is to an independent Commission which is not part of the defendant's Employment Security Division. It should be briefly noted here that the delay by said Commissioners in rendering a decision is a key fact relied upon by the Connecticut District Court. This even though the

Commission, a separate agency, was not a party to this action, and even though admission of the statistics concerning the delay period was timely objected to by defendant as being irrelevant, immaterial and incompetent. It is hindsight, which is not a proper test, to rule a *hearing* inadequate on the basis of what happens *after* the hearing.

Indiana Employment Security Division v. Burney, 409 U.S. 540, 93 S. Ct. 883, 35 L. Ed. 2d. 62 (1973), is a question mark at this time because of this Court's action in sending it back for a determination as to whether or not the case was moot. It could reappear before this Court again so far as defendant presently knows. In addition to that possibility, a petition for Certiorari, as already mentioned above, has been filed in *Crow*. Further, another important unemployment compensation case involving the same issue, *Pregent v. New Hampshire Department of Employment Security et al*, _____ F. Supp. _____ (1973), is "waiting in the wings;" the defendants in *Pregent* will soon file their Jurisdictional Statement. Thus, New Hampshire and California also seek a definitive statement by this Court concerning this issue. Defendant argued unsuccessfully to the Connecticut District Court that this Court's affirmation of *Torres* without memorandum, in conjunction with its remand of *Burney*, should be interpreted as a statement to all that this Court was satisfied with *Torres* as being dispositive in unemployment compensation cases, and that this Court did not want any more of these cases. Whether or not this is true, more of these cases can be expected unless and until this Court actually states its position on this issue.

Defendant respectfully submits that for the above reasons the plaintiffs' Motion To Affirm should be denied, and jurisdiction should be noted by this Court.

Respectfully submitted,

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Attorneys for Appellants

PROOF OF SERVICE

I, Donald E. Wasik, Assistant Attorney General of the State of Connecticut, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on January 18, 1974, pursuant to Rule 33.3(b) of the Rules of the Supreme Court of the United States, I served a copy of the foregoing Jurisdictional Statement on Raymond J. Kelly, Esquire and John M. Creane, Esquire, by depositing the same enclosed in a sealed envelope, postage prepaid, in the United States mails, addressed to them at their last known address:

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Dated this 18th day of January, 1974.

DONALD E. WASIK
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